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Nos. 78-1239 and 78-1311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

MARSHALL P. SAFIR,
Petitioner,

v.

ROBERT W. BLACKWELL ET AL.,
Respondents.

MARSHALL P. SAFIR,
Petitioner,

v.

AMERICAN EXPORT LINES, INC. ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT STEAMSHIP COMPANIES IN OPPOSITION

[List of Counsel on Inside Cover]

March 30, 1979.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-24a)[1] is reported at 579 F.2d 742. The opinion of the district court (Pet. App. 25a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1978. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on November 28, 1978. The petition in No. 78-1239 was filed on February 9, 1979, and the petition in No. 78-1311 was filed on February 23, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1) Whether petitioner should have been granted leave to amend a nine-year-old complaint that sought relief against federal officials under the Merchant Marine Act, 1936—and had been moribund for several years—to add a count against private parties under the False Claims Act (No. 78-1239).

2) Whether petitioner's separate, newly filed complaint under the False Claims Act was based on information already known to the United States and was therefore properly dismissed for lack of jurisdiction (No. 78-1311).

STATUTE INVOLVED

The relevant provisions of the False Claims Act are printed at Pet. App. 165a-167a.

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[1] The appendix in No. 78-1239 is identical to that in No. 78-1311, and accordingly all "Pet. App." references herein will not be identified by petition number.

STATEMENT

1. This case presents another episode in a course of litigation that has been proceeding for over ten years.[2] In March 1965, Sapphire Steamship Lines, Inc., fifty percent of which was owned by petitioner, entered the military cargo trade serving routes between United States Atlantic and Gulf ports and ports in the United Kingdom/Bordeaux/Hambourg range. The steamship companies comprising the Atlantic and Gulf American Flag Berth Operators conference ("AGAFBO") lowered their rates to meet this new competition. Pet. App. 28a. Sapphire failed to operate profitably and was adjudged a bankrupt in 1967. Subsequently the Federal Maritime Commission determined that the AGAFBO rates from March 31, 1965 to March 1, 1966 were unreasonably low and unjustly discriminatory with respect to Sapphire, in violation of Sections 15 and 18(b)(5) of the Shipping Act of 1916, 46 U.S.C. 814 and 817(b)(5). *Rates on U.S. Government Cargoes*, 11 FMC 263 (1967).

On June 24, 1968, petitioner filed a complaint in the District Court for the Eastern District of New York, naming as defendants the Secretary of Commerce and officials of the Maritime Administration in the Department of Commerce and seeking declaratory and injunctive relief compelling them to act under Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, to recover from the federally subsidized AGAFBO members the subsidies paid[3] during the eleven months that

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[2] A detailed exposition of the litigation appears in the appendix to the brief filed in the court of appeals on behalf of the four "non-trade" steamship lines (see text, *infra*). We have lodged a copy of that brief with the Clerk of this Court.

[3] The Merchant Marine Act provides for payment of both "construction-differential" and "operating-differential" subsidies to qualified operators. In broad terms, the construction-differential subsidy is designed to offset the difference between the cost of

the unlawful rates had been in effect.[4] Pet. App. 143a-149a.

2. The district court dismissed the complaint but the court of appeals reversed, ruling (a) that petitioner had standing to bring his suit, (b) that although Section 810 absolutely prohibits current payments to operators found to be actively in violation of its terms, the Secretary has discretion to determine whether to recover past payments, and (c) that that discretion was not unlimited in that the Secretary could not refuse to proceed against the lines without at least considering the interest of petitioner, who asserted a desire to return as soon as possible to the trade. *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).[5] In a subsequent proceeding the court of appeals ruled that in determining how to exercise his discretion the Secretary was obliged to accept as *res judicata* the Federal Maritime Commission's determination that the AGAFBO rate reductions were unjustly discrimina-

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building a new ship in an American shipyard and the cost of building the same ship in a representative foreign shipyard; the operating-differential subsidy is designed to offset the difference between certain ship operating costs of a subsidized carrier (*e.g.*, crew wages) and the costs of the same items to the subsidized carrier's foreign competitors. In return for the subsidy the operator agrees to substantial federal regulation of its business and contracts to provide a stipulated number of voyages on defined "essential" trade routes with identified United States-flag vessels employing United States citizen crews. See 46 U.S.C. 1151-1161, 1171-1183; see generally, *Moore-McCormack Lines, Inc.* v. *United States*, 188 Ct. Cl. 644, 649-651 (1969).

[4] Section 810 provides that "[i]t shall be unlawful for any contractor receiving an operating-differential subsidy * * * to continue as a party to or to conform to any agreement with another carrier * * * which is unjustly discriminatory or unfair," and that "[n]o payment of subsidy * * * shall be paid * * * to any contractor * * * who shall violate this section."

[5] Petitioner sought review here of the court of appeals' rejection of his argument that the Secretary was under a mandatory duty to recover all subsidy paid during the eleven month period, but certiorari was denied, 400 U.S. 850 (1970).

tory to Sapphire. *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970).

On remand, the Maritime Subsidy Board held a hearing and determined that it would require a partial repayment of subsidy from the "trade lines" (those AGAFBO members that were in actual competition with Sapphire), but not from the "non-trade" lines (those lines that served different routes from Sapphire, did not engage in the rate reductions, and accordingly were held to have only technically violated Section 810 by virtue of their membership in AGAFBO). *Investigation of Alleged Section 810 Violation*, 14 SRR 77 (1973). The then-Secretary of Commerce affirmed that decision, except that he reduced the penalties assessed against the trade lines. Pet. App. 89a, 91a-92a.

3. Petitioner thereupon sought review in the District Court for the District of Columbia, asserting—as he had earlier in the Second Circuit—that the Secretary had no discretion to recover anything less than the full amount of subsidy paid to all of the lines during the period of violation. The district court dismissed the complaint.

The court of appeals affirmed the district court's ruling that the Secretary is not under a mandatory duty to recover all subsidies, but reversed and remanded for determination whether the Secretary's decision constituted an abuse of discretion. *Safir* v. *Kreps*, 551 F.2d 447 (D.C. Cir. 1977). This Court denied Safir's petition for a writ of certiorari (as well as conditional cross-petitions filed by the United States and by the steamship companies), 434 U.S. 820 (1977), and proceedings in the district court on remand are ongoing.

4. The instant case arises out of petitioner's renewed resort to the Eastern District of New York. On May 26, 1977, he filed a complaint against the steamship companies under the False Claims Act, 31 U.S.C. 231-235, alleging that the subsidy vouchers the lines had

submitted in respect to voyages completed during the 1965-1966 period falsely represented that the lines were in compliance with applicable statutory and contractual requirements. Pet. App. 26a. In addition, on September 13, 1977, petitioner moved to assert the same claim by way of amendment to the complaint he had originally filed in 1968. *Id.* 32a.

The district court dismissed the new complaint for want of jurisdiction. Section 232(C) of the False Claims Act provides that the district court "shall have no jurisdiction" over a *qui tam* suit "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States * * * at the time such suit was brought." The district court reviewed at length the information and evidence upon which petitioner's False Claims Act suit was based (Pet. App. 39a-40a) and concluded that it was "unanswerably clear" that such information and evidence was in the Government's possession as of May 26, 1977. In addition, the court ruled that petitioner could not avoid the jurisdictional bar simply because he was himself the source of much of the evidence and information in the Government's possession. *Id.* 41a-44a. The court of appeals affirmed, stating that it was "not altogether happy" about the jurisdictional bar in cases where the would-be plaintiff is the source of the Government's knowledge, but concluding that dismissal was required by the relevant precedent construing the Act and that this case did not warrant the creation of an exception to the rule. *Id.* 22a-24a.

The district court also denied petitioner's motion to amend the 1968 complaint, ruling (Pet. App. 37a):

> "While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim."

The court of appeals affirmed this ruling as well, quoting the above passage and concluding that "We can find no sound basis for disagreeing with this analysis." Pet. App. 21a. The two petitions herein followed.

ARGUMENT

In affirming the denial of petitioner's motion to amend his old complaint, and the dismissal of his new complaint, the court of appeals correctly applied settled principles to the particular facts of this case. There is no conflict among the circuits on any of the issues petitioner raises, and further review by this Court is accordingly unwarranted.

1. *No. 78-1239.* "It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). In determining whether to allow new counts the trial court may properly consider "the untimeliness of their presentation" (*id.* at 322) and refuse leave to amend if the plaintiff is guilty of "undue delay" (*Foman* v. *Davis*, 371 U.S. 178, 182 (1962)). Here petitioner sought in 1977 to amend a 1968 complaint that had been dormant

for a number of years[6] to add a claim against the respondent steamship companies that by his own admission (Pet. 13, 27) petitioner as long ago as 1972 knew was potentially available to him. In these circumstances the district court did not abuse its discretion in declining "to allow this closed case to be revived by amendment." Pet. App. 34a.

Petitioner argues that "there is an identity between the amendment and the original complaint" (Pet. 15, quoting from *United States* v. *Templeton*, 199 F. Supp. 179, 183 (E.D. Tenn. 1961)); that the proposed amendment therefore meets the standards for amendments that relate back to the date of the original complaint under Rule 15(c), Fed. R. Civ. P.; and that his motion for leave to amend should therefore have been granted. But, even assuming that amendments that would satisfy Rule 15(c) must automatically be granted under Rule 15(a), petitioner's argument must fail, for the courts below correctly determined that the proposed amendment was insufficiently related to the original complaint to meet the requirements of Rule 15(c).

The 1968 complaint charged federal officers with failing to bring an administrative action to recover money al-

[6] Petitioner moved to amend on September 13, 1977. On September 17, 1970, the district court issued its judgment implementing the mandate of the Second Circuit directing an administrative proceeding in *Safir* v. *Gibson*, *supra*, 432 F.2d 137 (Pet. App. 142a). As described above, the administrative proceeding was subsequently concluded and review sought by petitioner in the District Court for the District of Columbia. In the Eastern District of New York petitioner in the meantime made several motions for ancillary relief —*e.g.*, to require certain of the steamship companies to pay into escrow monies expected to become payable to them upon the sale of certain ships (motion denied, Pet. App. 96a, *aff'd*, *Safir* v. *Blackwell*, 469 F.2d 1061 (2d Cir. 1972), *cert. denied*, 414 U.S. 975 (1973))—but from 1970 on that district court made no substantive ruling on the merits of petitioner's complaint and indeed from 1975 on took no action whatever in what by then had become a totally inactive case. See the docket sheet in No. 68-C-643, a copy of which we have lodged with the Clerk of this Court.

legedly wrongfully paid to the steamship companies during a period in which they were found to have participated in an agreement unfair to petitioner. By contrast, the proposed amendment would commence a federal court action directly against the carriers, not by federal officers but by petitioner himself (in a *qui tam* role), to recover twice the money paid, on the ground that the companies submitted knowingly false subsidy vouchers covering the period during which they were determined to have engaged in the prohibited agreement.[7] In light of these differences, the courts below were amply justified in concluding (Pet. App. 21a, 37a):

> "The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious, or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim."

This factual determination does not warrant further review by this Court.[8]

[7] Petitioner's reliance (Pet. 17-18) upon *United States* v. *Templeton*, *supra*, is accordingly misplaced. There, in deciding that one count of a proposed amendment would relate back to the date of the original complaint, the court noted that both amendment and complaint stated a claim under the False Claims Act, the first seeking that Act's damages remedy and the second the Act's forfeiture remedy. 199 F.Supp. at 184. A second count of the proposed amendment was disallowed on the ground, *inter alia*, that it sought to plead a cause of action under a new statute—as petitioner's proposed amended complaint did. *Id.* at 182-183.

[8] Petitioner incorrectly suggests (Pet. 15) that from the determination that the steamship companies engaged for eleven months in an unlawful rate agreement it follows inexorably that any subsidy vouchers submitted for operations during that period violated the False Claims Act because they averred compliance with all contractual and statutory requirements. None of the carriers' con-

Petitioner also asserts (Pet. 26-36) that in passing on his motion to amend the courts below should have taken into account an alleged conspiracy (described *infra*) between high government officials and the respondent steamship companies that tolled the six-year statute of limitations for suits under the False Claims Act. But petitioner's motion to amend was denied because it would completely "transform" the original case (Pet. App. 21a), not because of any limitations bar. Given that dispositive (and correct) ruling, it was not error for the courts below to eschew determining whether there were independent grounds upon which petitioner's motion might be tested.

2. *No. 78-1311.* A private individual seeking to sue under the False Claims Act, 31 U.S.C. 231-235, must notify the United States of the suit and "of substantially all evidence and information in his possession material to the effective prosecution of such suit." 31 U.S.C. 232(C). If "it shall be made to appear that such suit was based upon evidence or information in the possession of the United States * * * at the time such suit was brought," then the district court "shall have no jurisdiction." *Ibid.*

duct was ever characterized by the attempt at concealment that is a necessary element of fraud under that Act (see, *e.g.*, *United States ex rel. Nitkey* v. *Dawes*, 151 F.2d 639 (7th Cir. 1945)). The AGAFBO rate reductions themselves were of course a matter of public knowledge and became the subject of official government concern almost immediately, see Hearings Before the Subcommittee on Federal Procurement and Regulations of the Joint Economic Committee, "Discriminatory Ocean Freight Rates and the Balance of Payments," 89th Cong., 1st Sess. pp. 106 *et seq.* (1965). From that point on the reductions were subject to continuing scrutiny, through petitioner's efforts and otherwise, by Congress, administrative agencies, and the courts. See Pet. App. 39a-40a. Given the public nature of the matter it is difficult to see how the carriers' presentation of subsidy vouchers could possibly have defrauded the Government. The more important point for present purposes, however, is that this issue of fraud has very little indeed to do with the issue originally tendered by petitioner in 1968—the duty of Department of Commerce officials to act in light of the carriers' open participation in the rate reductions themselves.

On May 26, 1977, the day on which petitioner filed his False Claims Act complaint, he notified the Attorney General of the suit by letter and attached "a copy of the complaint with Attachments A and B comprising substantially all the pertinent evidence and information material to the effective prosecution of this suit." Pet. App. 86a. Attachments A and B consisted of the petition and appendix thereto in *Safir* v. *Kreps*, *supra*, *cert. denied*, 434 U.S. 820 (1977) (No. 76-1505),[9] which in turn consisted almost entirely of pleadings, briefs, and decisions already filed in this litigation. The district court dismissed the complaint for lack of jurisdiction under Section 232(C), ruling that it was based on evidence or information already known to the United States. Pet. App. 39a-41a. Petitioner does not deny that all of the evidence recounted by the district court was in the possession of the United States on the date his complaint was filed, and indeed if, as he stated in his letter to the Attorney General and in the complaint itself (*id.* 82a-83a, 86a), the evidence on which his suit was based was fully set forth in the petition and appendix in No. 76-1505, then there can be little doubt that that evidence was already in the Government's possession by May 26, 1977, for petitioner's papers in No. 76-1505 were dated (and presumably filed and served upon the United States on or about) April 26, 1977.

Petitioner asserts, however, that there exists other evidence—namely, of a criminal conspiracy among high government officials and the respondent steamship companies —of which the Government was unaware and the subsequent disclosure of which (by petitioner) "eliminated the bar to the [district court's] jurisdiction." Pet. 15. Both courts below ruled that this new "evidence" was not

[9] Pet. App. 80a, 82a-83a.

germane to the False Claims Act claims. Pet. App. 22a n.5, 38a.[10]

Although the alleged conspiracy was brought to petitioner's attention as long ago as 1973 (see below), he never mentioned it (a) before filing his complaint, (b) in the complaint itself, or (c) in his letter to the Attorney General. Rather, it was revealed for the first time in a deposition of petitioner taken on September 28, 1977,[11] when he testified that, with a $7 million payment, the respondent steamship companies in 1968 bribed former President Nixon to select Spiro T. Agnew as his vice-presidential running mate, to appoint other hand-picked individuals to the Maritime Administration and the Federal Maritime Commission, and to instruct them to disregard the law in reaching their decisions in administrative and judicial matters involving the carriers and petitioner. The only factual basis asserted by petitioner for this startling charge was that in October 1973 a journalist whom he scarcely knew telephoned him and asked him whether he had ever heard that such a conspiracy existed. Pet. App. 48a-49a. Petitioner himself found the suggestion that such a bribe may have occurred "improbable" and "bizarre":[12] he made no effort to verify the reporter's suspicions and when, several months later, he visited the reporter, the latter was unresponsive and gave the impression that he wished he had never talked to petitioner in

[10] The district court also ruled (Pet. App. 38a) that evidence of the alleged conspiracy would not overcome the jurisdictional bar because by petitioner's own account (*id.* 50a) it came from "leaks" from the Watergate Prosecutor's Office. The court of appeals found it unnecessary to pass on the issue. *Id.* 22a n.5.

[11] Petitioner's suggestion (Pet. 13) that "the allegations regarding the 'corrupt arrangement' [are] set forth in the pleadings" is incorrect and his assertion (*ibid.*) that the matters asserted in his deposition "must be accepted as true" is accordingly not well taken.

[12] At page 40 petitioner's deposition, not reproduced in the appendix, petitioner stated, "I felt the whole conversation at the time was bizarre anyway and it was highly improbable, it still does."

the first place. *Id.* 62a-65a. Petitioner apparently let the matter lie until he raised it in his deposition.

Relying on *United States* v. *Rippetoe*, 178 F.2d 735 (4th Cir. 1949), which held that knowledge by a government officer of a fraud in which the officer was participating cannot be imputed to the United States under Section 232 (C), petitioner appears to suggest that the district court had jurisdiction over his False Claims Act complaint because the government officials to whom he presented the information and evidence upon which it was based were the very officials "who had entered into a corrupt arrangement with the perpetrators of the fraud and whose interest it was to conceal the fraud and to defeat its prosecution." Pet. 4 (first question presented), 10-13, 15. If that is petitioner's argument, however, then this case is not at all like *Rippetoe*. Petitioner submitted the information and evidence underlying his suit to the Justice Department, which was not among those said by petitioner to have been tainted by the alleged conspiracy. Moreover, the alleged conspiracy involved officials in the Nixon Administration, which ended on August 9, 1974—long before petitioner presented his evidence and information in May 1977 to the Attorney General. Thus, even if one could ascribe some credibility to petitioner's unsupported accusations of conspiracy,[13] there is no indication whatever that the officials to whom petitioner presented his information and evidence were involved in that conspiracy,

[13] But see the Memorandum and Order of March 29, 1978 in *Safir* v. *Kreps*, C.A. No. 74-1474 (D.D.C.) (the pending litigation to review the Secretary's decision not to require repayment of all subsidies), denying petitioner's motion for a subpoena *duces tecum* directed to the Administrator of the General Services Administration to produce the "Nixon tapes" so that petitioner might attempt to verify his suspicions: the court ruled (slip op. 4) that petitioner had failed sufficiently to substantiate the allegations of fraud or corruption. (Petitioner has renewed that motion and it is now *sub judice* in the district court.)

and therefore the courts below correctly held that petitioner's accusations were irrelevant to the False Claim Act complaint.

Petitioner may alternatively be suggesting that the revelation of the alleged conspiracy "eliminated the bar to the [district court's] jurisdiction" (Pet. 15) because until federal officials outside of the allegedly corrupt group learned from petitioner of the conspiracy involving the Maritime Administration they had no reason to suspect fraud in the submission and payment of sudsidy vouchers. Here again, however, the facts will not cooperate. As the district court determined (Pet. App. 39a-40a), the facts surrounding the payment of subsidy, and indeed the question whether to pay subsidy, were thoroughly aired and debated not only in administrative, but also in congressional and judicial forums before, during, and after the period of alleged conspiracy which is said to have disabled the Government. In short, this alternative suggested theory fares no better than the first: the evidence of alleged conspiracy, even if it could be regarded as creditable, was properly held irrelevant to the question of jurisdiction under Section 232(C).

Petitioner incorrectly asserts (Pet. 12-13) that there is a conflict between the decision below and the decision of the Third Circuit in *United States* v. *Aster*, 275 F.2d 281 (1960).[14] The Second Circuit expressly followed *Aster* (Pet. App. 24a), as did the only other court of appeals to our knowledge to have considered the issue. *Pettis ex rel. United States* v. *Morrison-Knudsen Co.*, 577 F.2d 668, 672-673 (9th Cir. 1978).

[14] Petitioner also asserts (Pet. 8) that the court of appeals in this case "held that clarification of the meaning of Sec. 232(C) would be of benefit to the Courts in general if the Supreme Court would assume the task." We can find no such statement in the court of appeals' decision.

CONCLUSION

The petitions for a writ of certiorari should be denied.[15]

Respectfully submitted,

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[15] "As the prevailing part[ies], [respondents are] of course free to defend [their] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *State of Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388 (January 16, 1979), slip op. at 15, n.20. Accordingly, should review be granted, we would renew our arguments, properly raised but not passed upon below, (a) that peti-

tioner's motion to amend should be denied for the additional reason that the district court lacked jurisdiction by virtue of 31 U.S.C. 232(C) since even in 1968, when petitioner's original complaint was filed, the United States knew all of the evidence and information upon which petitioner's False Claims Act count was based, and (b) that the new False Claims Act complaint was properly dismissed because the statute of limitations had run and because the lines' submission of subsidy vouchers was as a matter of law not fraudulent.